No. 99-901

MAY 22 2000

In the Supreme Court of the United States

BRENTWOOD ACADEMY, PETITIONER

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

DENNIS J. DIMSEY
GREGORY B. FRIEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

27 pp

QUESTION PRESENTED

Whether an athletic association's regulation of interscholastic athletic competition constitutes state action under the Fourteenth Amendment and activity under color of state law for purposes of 42 U.S.C. 1983 (1994 & Supp. III 1997), when the association is controlled by representatives of public schools located in the same State.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
Respondent is engaged in state action because it is controlled by its public school members and it serves state educational objectives	10
A. Public schools and their officials are state actors	10
B. Government controlled entities that serve government objectives are state actors	11
C. Athletic associations that are composed primarily of public schools in a single state are state actors	13
D. Respondent's regulation of interscholastic athletic competition constitutes state action	20
Conclusion	22

TABLE OF AUTHORITIES

Cases:

American Bankers Mortgage Corp. v. *Federal Home Loan Mortgage Corp.*, 75 F.3d 1401 (9th Cir.), cert. denied, 519 U.S. 812 (1996)	15
American Mfrs. Mut. Ins. Co. v. *Sullivan*, 526 U.S. 40 (1999)	1, 10
Avery v. *Midland County*, 390 U.S. 474 (1968)	11
Becker v. *Gallaudet Univ.*, 66 F. Supp. 2d 16 (D.D.C. 1999)	15
Blum v. *Yaretsky*, 457 U.S. 991 (1982)	21, 22
Brenden v. *Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973)	18

Cases—Continued: Page

Carnes v. *Tennessee Secondary Schs. Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976) 18
Chiaffitelli v. *Dettmer Hosp., Inc.*, 437 F.2d 429 (6th Cir. 1971) 15
Clark v. *Arizona Intersholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983) ... 14, 15, 16
Communities for Equity v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729 (W.D. Mich. 2000) 18
Crane v. *Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315 (7th Cir. 1992) 14
Evans v. *Newton*, 382 U.S. 296 (1966) 8, 12, 13
Foster v. *Ripley*, 645 F.2d 1142 (D.C. Cir. 1981) 15
Georgia v. *McCollum*, 505 U.S. 42 (1992) 1
Gilpin v. *Kansas State High Sch. Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1973) 18
Griffin High Sch. v. *Illinois High Sch. Ass'n*, 822 F.2d 671 (7th Cir. 1987) 14
Hack v. *President and Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998) 15
Hall v. *American Nat'l Red Cross*, 86 F.3d 919 (9th Cir.), cert. denied, 519 U.S. 1010 (1996) 15
Hoover v. *Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) 18
Jackson v. *Statler Found.*, 496 F.2d 623 (2d Cir. 1973) 15
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 8, 12, 13, 14
Louisiana High Sch. Athletic Ass'n v. *St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968) 14, 16, 18
Lugar v. *Edmondson Oil Co.*, 457 U.S. 922 (1982) 2, 10, 11, 17
McVarish v. *Mid-Nebraska Community Mental Health Ctr.*, 696 F.2d 69 (8th Cir. 1982) 15

Cases—Continued: Page

National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999) 19
National Collegiate Athletic Ass'n v. *Tarkanian*, 488 U.S. 179 (1988) 6, 9, 15, 16, 17, 18
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 11
Pennsylvania v. *Board of Dirs. of City Trust*, 353 U.S. 230 (1957) 8, 11, 12
Polk County v. *Dodson*, 454 U.S. 312 (1981) 1
Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982) 13, 21, 22
San Franciso Arts & Athletics, Inc. v. *United States Olympic Comm.*, 483 U.S. 522 (1987) 21-22
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 10
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 14
United States ex rel. Mo. State High Sch. Activities Ass'n v. *Missouri State High Sch. Activities, Ass'n*, 682 F.2d 147 (8th Cir. 1982) 14
United States v. *Morrison*, No. 99-5 (May 15, 2000) 10
West v. *Atkins*, 487 U.S. 42 (1988) 11

Constitution and statutes:

U.S. Const.:
Amend. I 5, 6
Amend. XIV 1, 5, 8, 10, 11, 12, 21
Civil Rights Act of 1964, Tit. VI, § 601, 42 U.S.C. 2000d 19
Education Amendments of 1972, Tit. IX, § 901, 20 U.S.C. 1681(a) 19
18 U.S.C. 242 (1994 & Supp. IV 1998) 2
42 U.S.C. 1983 (1994 & Supp. III 1997) 1, 2, 5, 10
42 U.S.C. 2000h-2 2

Miscellaneous:

Tenn. Op. Att'y Gen. No. 83-163, 1983 WL 167080 (Apr. 5, 1983) 4, 20

In the Supreme Court of the United States

No. 99-901

BRENTWOOD ACADEMY, PETITIONER

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether an athletic association's regulation of interscholastic athletic competition qualifies as state action under the Fourteenth Amendment and as activity under color of state law for purposes of 42 U.S.C. 1983 (1994 & Supp. III 1997) when the association is controlled by representatives of public schools located in the same State. The United States has participated as amicus curiae in many of this Court's state action cases, see, *e.g.*, *American Mfrs. Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40 (1999); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Polk County* v. *Dodson*, 454 U.S. 312 (1981), and it has a substantial interest in the state action question presented here.

First, the Attorney General has authority under 42 U.S.C. 2000h-2 to intervene in any action alleging an equal protection violation based on race, color, religion, sex, or national origin. That statute gives the United States the authority to intervene in cases alleging that athletic associations have committed equal protection violations based on race or sex. The Court's decision in this case will affect that enforcement responsibility.

The United States also has authority to bring criminal prosecutions under 18 U.S.C. 242 (1994 & Supp. IV 1998), which makes it a criminal offense to act willfully and under color of state law to deprive a person of rights protected by the Constitution or laws of the United States. Because the Court has interpreted the phrase "under color of" law to have the same meaning under Section 242 as it does under Section 1983, *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 928 n.9 (1982), the decision in this case could affect that responsibility.

Finally, the United States has an interest in ensuring that it can provide certain forms of support to private entities without subjecting them to constitutional constraints. The decision in this case could affect that interest.

STATEMENT

1. The Tennessee Secondary School Athletic Association (respondent) is a non-profit Tennessee corporation that regulates interscholastic athletic competition among public and private high schools in Tennessee. Pet. App. 4B-5B, 31B. Respondent is composed of 290 public schools and 55 private schools. *Id.* at 4B. Public high schools constitute approximately 84% of respondent's voting membership. *Id.* at 4B-5B. Respondent is the only interscholastic athletic association in Tennessee, and every public high school in Tennessee

that has an interscholastic athletic program is a member of respondent. *Id.* at 22B.

Respondent is governed by a Legislative Council and a Board of Control. Pet. App. 5B. The Legislative Council has authority to enact regulations; the Board of Control has authority to enforce them. *Ibid.* The Legislative Council and the Board of Control are both nine-member bodies elected by popular vote from nine electoral districts. *Ibid.* Each member school that is represented by a principal or other school official at the annual election is entitled to one vote. J.A. 89, 92. Only high school principals, assistant principals, and superintendents are eligible to serve on the Legislative Council and the Board of Control. Pet. App. 5B. During the time period at issue here, the Legislative Council and Board of Control were composed exclusively of public school officials. *Ibid.*

Since 1925, the Tennessee State Board of Education (State Board) has recognized respondent's authority to regulate interscholastic competition. Pet. App. 23B. In 1972, the State Board adopted a regulation formally designating respondent as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Ibid.* The State Board also approved respondent's existing regulations and reserved the right to review the appropriateness of any changes in rules. *Id.* at 10B-11B. Between 1972 and 1992, the State Board approved various regulations adopted by respondent, including respondent's present recruiting rule. *Id.* at 11B, 24B-26B.

State Board documents reflect its understanding that it had delegated to respondent the authority to regulate interscholastic athletics on behalf of the State. Pet. App. 24B-26B. The Tennessee Attorney General ex-

pressed that same view. Tenn. Att'y Gen. Op. No. 83-163, 1983 WL 167080, at *1 (Apr. 5, 1983) (stating that respondent's "authority to regulate athletics is derived from the State Board of Education's broad authority to regulate public schools").

In 1995, the State Board revoked the 1972 regulation and adopted a new one in its place. Pet. App. 11B. The new regulation, which took effect in 1996 provides:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Ibid.

Representatives of the State Board and the State Department of Education serve as ex officio members on respondent's Board of Control and Legislative Council. Pet. App. 35B. After the State Board amended its regulation concerning its relationship with respondent, state representatives continued to serve as ex officio members on respondent's governing bodies. *Ibid.* Respondent receives no funding from the State, and its staff is not paid by the State. *Id.* at 8A. Tennessee law nonetheless authorizes respondent's administrative staff, including its Executive Director, to participate in the State's retirement system. *Id.* at 33B. Respondent derives a substantial portion of its revenue from gate receipts from athletic contests played at state-owned facilities. *Id.* at 32B. Respondent pays the State for the use of those facilities. *Id.* at 9A.

2. Petitioner Brentwood Academy is a private school and a member of respondent. Pet. App. 4B. In 1997, certain public high school coaches accused petitioner of violating respondent's recruiting rule. *Id.* at 11B-12B. That rule prohibits members from using "undue influence" to "secure or to retain a student for athletic purposes." *Id.* at 6B. After an investigation, respondent's Executive Director concluded that petitioner had violated respondent's recruiting rule by providing free game tickets to a coach at a public middle school and by inviting incoming students to a spring football practice. *Id.* at 14B-15B. The Executive Director also found that petitioner had violated another one of respondent's regulations. *Id.* at 15B. The Executive Director declared petitioner ineligible to participate in football and basketball tournaments for one year and placed petitioner on probation for two years. *Ibid.*

Respondent's Board of Control affirmed the Executive Director's determination that petitioner had violated the recruiting rule. Pet. App. 16B. The Board of Control increased the sanctions for the violations, banning petitioner from tournaments for two years, placing petitioner on probation for four years, and fining petitioner $3000. *Id.* at 17B. All nine of the voting Board of Control members who participated in petitioner's administrative appeal were principals of public high schools. *Id.* at 16B.

In December 1997, petitioner filed suit against respondent and its Executive Director under 42 U.S.C. 1983 (1994 & Supp. III 1997), alleging that respondent's recruiting rule violated, *inter alia*, the First Amendment to the Constitution as applied to the States through the Fourteenth Amendment. Pet. App. 3B-4B, 18B. The district court granted petitioner's motion for

summary judgment, holding that respondent's recruiting rule violated the First Amendment. *Id.* at 1B-62B.

The district court first held that respondent's adoption and enforcement of the recruiting rule constituted state action. Pet. App. 20B-37B. In reaching that conclusion, the court relied in part on the State Board's 1972 regulation designating respondent as the entity responsible for interscholastic athletics in Tennessee. *Id.* at 23B-27B. The court rejected respondent's argument that the 1995 regulation eliminated the basis for a finding of state action. The district court reasoned that the new regulation still singles out respondent by name as the organization responsible for the regulation of high school athletics and does not materially change the relationship between the State and respondent. *Id.* at 26B-27B.

The district court also relied on the composition of respondent's membership and leadership as a basis for its state action holding. Pet. App. 27B-28B. The court noted that "the overwhelming majority" of respondent's members are public schools, and that in 1997, "all members of the Board of Control and Legislative Council were principals of public schools." *Ibid.* The court concluded that those facts are independently sufficient to show that respondent is a state actor. *Id.* at 29B. In reaching that conclusion, the court relied on the statement in *National Collegiate Athletic Ass'n (NCAA)* v. *Tarkanian*, 488 U.S. 179, 194 n.13 (1988), that while the NCAA is not a state actor, "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." Pet. App. 29B.

The district court next held that respondent's recruiting rule violated the First Amendment on its face

and as applied to petitioner. Pet. App. 40B-58B. The court enjoined respondent from enforcing that rule. *Id.* at 61B.

3. The court of appeals reversed, Pet. App. 1A-18A, holding that respondent is not a state actor. The court first concluded that respondent is not an "arm of the government" because no Tennessee law or State Board regulation currently in effect delegates to respondent the authority to conduct interscholastic athletics on behalf of the State. *Id.* at 9A.

The court of appeals next concluded that respondent's actions are not "fairly attributable" to the State. Pet. App. 11A-18A. The court held that respondent's actions are not fairly attributable to the State under the "public function test" because the regulation of interscholastic sports is not a power "traditionally exclusively reserved to the state." *Id.* at 11A. It held that respondent's actions are not fairly attributable to the State under the "state compulsion test" because, in its view, the State had not "coerced or encouraged" the challenged conduct. *Id.* at 12A-13A. And, for essentially the same reasons, the court held that respondent's actions are not fairly attributable to the State under the "symbiotic relationship test." *Id.* at 13A-14A.

The court of appeals also rejected the district court's reliance on *Tarkanian*. Pet. App. 16A-17A. The court concluded that, under *Tarkanian*, even if respondent is a state actor when dealing with a public school, it is not a state actor in its relationship with private schools such as petitioner. *Id.* at 17A.

The court denied a petition for rehearing en banc. Pet. App. 1C-2C. Judge Merritt, joined by Judge Clay, dissented from the denial of rehearing en banc. *Id.* at 2C-6C. Judge Merritt stated that the panel's decision "appears to be inconsistent" with language from

Tarkanian. *Id.* at 4C. Judge Merritt also criticized the panel for ignoring the "cooperative relationship between [respondent] and the state's public high schools [and] the coercive power of [respondent]." *Id.* at 5C.

SUMMARY OF ARGUMENT

A. Public schools engage in state action within the meaning of the Fourteenth Amendment. Thus, if a public school were to adopt a rule governing participation in interscholastic athletic competition, that rule would be subject to challenge under the Fourteenth Amendment.

B. The result should not be different when such a rule is imposed by an athletic association that is controlled by its public school members. Like the actions of a public school, the actions of an athletic association controlled by public schools are fairly attributable to the State.

This Court's decisions support that conclusion. In several cases, the Court has held that nominally private entities that are publicly controlled and that serve government objectives are engaged in state action. The Court has applied that principle to a college created by a private will, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam), a privately owned park, *Evans* v. *Newton*, 382 U.S. 296 (1966), and a corporation that operates passenger trains, *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). Because each of those entities was publicly controlled and served a public purpose, the entity's actions constituted state action.

C. Under those decisions, an athletic association that is composed primarily of public schools is engaged in state action. When public schools constitute a voting majority of the members of an athletic association, they

have effective control over the actions of the association. And, since interscholastic athletic competition is a component of the education program offered by public schools, an athletic association's regulation of that activity furthers government objectives.

With the exception of the court below, the courts of appeals have uniformly held that athletic associations are state actors when they are composed primarily of public schools. In *NCAA* v. *Tarkanian*, 488 U.S. 179 (1988), the Court made clear that those decisions correctly implement state action principles.

A contrary view would permit a publicly controlled athletic association to engage in practices that blatantly discriminate on the basis of race or sex without exposing those practices to constitutional challenge. For example, such an athletic association could preclude private schools from joining the association based on the race of their students. Such an association could also deny girls the opportunity to participate in a wide range of interscholastic sports.

D. Under the correct state action analysis, respondent is engaged in state action. Public schools constitute approximately 84% of respondent's voting members, and during the relevant period, respondent's governing bodies were composed exclusively of public school officials. Respondent is therefore publicly controlled. Respondent's regulation of interscholastic athletic competition also serves state educational purposes. The Tennessee State Board of Education has adopted a regulation that expressly recognizes the importance of interscholastic athletic competition to public education and respondent's role in regulating such competition. Because respondent is controlled by public schools and serves government objectives, its regulation of interscholastic athletic competition constitutes state action.

ARGUMENT

RESPONDENT IS ENGAGED IN STATE ACTION BECAUSE IT IS CONTROLLED BY ITS PUBLIC SCHOOL MEMBERS AND IT SERVES STATE EDUCATIONAL OBJECTIVES

A. Public Schools And Their Officials Are State Actors

The Fourteenth Amendment to the Constitution, "by its very terms, prohibits only state action." *United States* v. *Morrison*, No. 99-5 (May 15, 2000), slip op. 21. It "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 & n.12 (1948). Similarly, 42 U.S.C. 1983 (1994 & Supp. III 1997) authorizes a cause of action to enforce constitutional guarantees only against persons who act "under color of" state law. Those limitations are identical "[w]here, as here, deprivations of rights under the Fourteenth Amendment are alleged." *American Mfrs. Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 n.8 (1999).

In general, conduct constitutes state action and action under color of law if (1) the alleged constitutional deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *American Mfrs.*, 526 U.S. at 50. The core inquiry is whether the alleged infringement of federal rights is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Application of that standard is straightforward when a suit is brought challenging the actions of a local government entity, such as a public school system, or a public official acting in an official capacity, such as a

principal. "The actions of local government *are* the actions of the State." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968). Similarly, except in unusual circumstances, a public employee engages in state action "while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West* v. *Atkins*, 487 U.S. 42, 50 (1988); see *ibid* (noting that a public defender is the only public official acting in an official capacity the Court has found not to be engaged in state action). Thus, under established state action principles, if a public school or its principal were to adopt a rule governing participation in interscholastic athletic competition, that rule would be subject to challenge under the Fourteenth Amendment. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 334-337 (1985) (public schools and public school officials are state actors for purposes of the Fourteenth Amendment).

B. Government Controlled Entities That Serve Government Objectives Are State Actors

The outcome should not be different when such a rule is adopted by an athletic association that is controlled by its public school members. When public entities control a nominally private entity that serves a public purpose, the actions of the nominally private entity are "fairly attributable to the State." *Lugar*, 457 U.S. at 937.

Several decisions of this Court support that conclusion. For example, in *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam), Girard College had been built and maintained pursuant to a private trust that limited admission to the college to white students. Pursuant to the terms of the trust, the college was operated and controlled by a board of state appointees, which was itself a state agency. *Id.* at

231. The Court held that, because the college was controlled by an agency of the State, the college's refusal to admit black students "was discrimination by the State * * * forbidden by the Fourteenth Amendment." *Ibid.*

Similarly, in *Evans* v. *Newton*, 382 U.S. 296 (1966), a person devised a tract of land to the City of Macon, Georgia, to be used as a municipal park for use by whites only. When the City determined that it could no longer constitutionally operate the park on a segregated basis, private trustees were appointed and title to the park was vested in them. *Id.* at 298. The Court held that the change in trustees did not automatically eliminate Fourteenth Amendment constraints. *Id.* at 301-302. The Court explained that the park served the public purpose of providing recreational opportunities to the community, *ibid.*, and that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment," *id.* at 301.

Finally, in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Court held that an operator of passenger trains commonly known as Amtrak is a government actor for constitutional purposes, despite Congress's designation of it as a private corporation. The Court emphasized that Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." *Id.* at 398. The Court added that "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the cor-

poration is part of the Government for purposes of the First Amendment." *Id.* at 400.

While *Lebron* involved a nominally private entity that was governmentally created, furthered a government objective, and was governmentally controlled, the Court did not suggest that all three features are necessary prerequisites to a finding of state action. To the contrary, the Court expressly reaffirmed the holding in *City Trusts* that Girard College was a state actor, even though it was created pursuant to a private trust, rather than a special law. 513 U.S. at 397. The fact that Amtrak "was created by a special statute" simply made it "an *a fortiori* case." *Ibid.*

Thus, the entities involved in *City Trusts*, *Evans*, and *Lebron* shared two important characteristics. First, each of the entities was subject to government control. Second, the services provided by each of the entities furthered government objectives.[1] *City Trusts*, *Evans*, and *Lebron* therefore support the following state action principle: A publicly-controlled entity that furthers government objectives is engaged in state action.

C. Athletic Associations That Are Composed Primarily Of Public Schools In A Single State Are State Actors

1. Applying that principle, an athletic association's regulation of interscholastic athletic competition constitutes state action when public schools constitute a majority of the association's voting members. When

---

[1] *Evans* and *Lebron* specifically referred to the public objectives served by the entity. *Evans*, 382 U.S. at 301-302 (park serves a public purpose); *Lebron*, 513 U.S. 397-398 (passenger rail service furthers government objectives). While *City Trusts* did not specifically mention that factor, it was present in that case as well. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982) (education serves a public function).

public schools constitute a voting majority, they have effective control over elections for the association's governing body. In such circumstances, the association is fairly viewed as publicly-controlled. See *Lebron*, (entity is government controlled when the government appoints a majority of the members of the governing body); cf. *Thornburg* v. *Gingles*, 478 U.S. 30, 50 & n.17 (1986) (group that is in the majority has potential to elect candidates of its choice). Moreover, since interscholastic athletic competition is a component of the education program offered by public schools, an athletic association's regulation of that activity furthers government objectives. Because athletic associations composed primarily of public schools are publicly controlled and serve government objectives, they are state actors for constitutional purposes.

2. The courts of appeals have long taken that view. With the exception of the court below, the courts of appeals have uniformly held that athletic associations composed primarily of public schools are state actors.[2]

---

[2] See *Griffin High School* v. *Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) ("Public schools make up 85% of the [association's] membership," and "the overwhelmingly public character of the [association's] membership is sufficient to confer state action."); *United States ex rel. Mo. State High Sch. Activities Ass'n* v. *Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) ("Because MSHSAA is an association comprised primarily of public schools, its rules are state action."); *Louisiana High Sch. Athletic Ass'n* v. *St. Augustine High Sch.*, 396 F.2d 224, 227 (5th Cir. 1968) (emphasizing that 85% of members are public schools); see *Crane* v. *Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting) (association is "composed primarily of public schools—so its actions, I agree, are state action"); see also *Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (concluding that actions of an athletic association are state action because "member public schools

The courts of appeals have also held in other contexts that entities are state actors when their governing bodies consist primarily of state officials or persons appointed by state officials.[3] In contrast, the courts have refused to find state action when government appointees and public officials constitute less than a majority on an entity's governing body and government control is not otherwise established.[4] That approach correctly implements the state action requirement.

3. *NCAA* v. *Tarkanian*, 488 U.S. 179 (1988), provides further support for the conclusion that an athletic association is a state actor when public schools constitute a majority of its voting members. In *Tarkanian*,

---

play a substantial role in determining and enforcing the policies and regulations of the [association]"), cert. denied, 464 U.S. 818 (1983).

[3] *McVarish* v. *Mid-Nebraska Community Mental Health Ctr.*, 696 F.2d 69, 71 (8th Cir. 1982) (mental health center); *Foster* v. *Ripley*, 645 F.2d 1142, 1147 (D.C. Cir. 1981) (scientific research organization); *Jackson* v. *Statler Found.*, 496 F.2d 623 (2d Cir. 1973) (foundation); *Chiaffitelli* v. *Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (hospital).

[4] *American Bankers Mortgage Corp.* v. *Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1407-1409 (9th Cir.) (Freddie Mac is not a government actor since government is entitled to appoint fewer than one-third of Freddie Mac's directors), cert. denied, 519 U.S. 812 (1996); *Hall* v. *American Nat'l Red Cross*, 86 F.3d 919, 921-922 (9th Cir.) (Red Cross is not a government actor since President appoints only 8 of the 50 members of its Board of Governors), cert. denied, 519 U.S. 1010 (1996); *Becker* v. *Gallaudet Univ.*, 66 F. Supp. 2d 16, 20-21 (D.D.C. 1999) (Gallaudet University is not a government actor since only three of the 21 members of its governing body are public officials); *Hack* v. *President & Fellows of Yale College*, 16 F. Supp. 2d 183, 188-189 (D. Conn. 1998) (Yale College is not a government actor since Governor and Lieutenant Governor are the only two government officials on the 19-member governing body).

the Court held that the NCAA did not engage in state action when it pressured the University of Nevada at Las Vegas to suspend its head basketball coach. The Court reasoned that, because the NCAA is composed primarily of universities from States other than Nevada, NCAA's conduct could not be viewed as action under color of Nevada law. *Id.* at 191.

The Court observed, however, that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Tarkanian*, 488 U.S. at 193 n.13. The Court then cited with approval two court of appeals decisions that had held that athletic associations composed primarily of public schools located within the same State are state actors for purposes of the Constitution. *Ibid* (citing *Clark*, *supra*, and *Louisiana High Sch. Athletic Ass'n*, *supra*). *Tarkanian* therefore supports the state action theory we have articulated here.

The court of appeals in this case drew a different conclusion. In its view (Pet. App. 17A), *Tarkanian* suggests that a single-State athletic association may be engaged in state action when it regulates a public school, but not when it regulates a private school. That reading of *Tarkanian* is mistaken. One of the cases cited by *Tarkanian* with approval (488 U.S. at 193 n.13) held that a high school athletic association engaged in state action when it denied membership to a private school. See *Louisiana High Sch. Athletic Ass'n*, 396 F.2d at 225-226. More fundamentally, *Tarkanian* makes clear that the critical distinction for state action purposes is between a national athletic association composed primarily of private schools from many States and an athletic association composed primarily of public

schools in a single State. 488 U.S. at 193 & n.13. The former is not a state actor, but the latter is. *Ibid.* The dissent in *Tarkanian* drew a distinction between an athletic association's regulation of public schools and its regulation of private schools. *Id.* at 202 & n.2 (White, J., dissenting). The Court, however, rejected the dissent's theory. *Id.* at 193 & n.13, 197 n.17. *Tarkanian* therefore supports the conclusion that an athletic association is a state actor when a majority of its voting members are public schools in a single State.[5]

4. Treating athletic associations as state actors when public schools constitute a voting majority also accords with the purposes of the state action requirement. Those purposes are to "preserve[] an area of individual freedom," and to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. When public schools constitute a voting majority of an athletic association and control the elections for the association's governing body, subjecting the association's decisions to constitutional scrutiny does not intrude into an area of individual freedom. At the same time, since public entities have effective control over the association's decisions, it is not unfair to hold the State responsible for them.

5. Failing to subject the decisions of such an association to constitutional scrutiny could also have far-reaching consequences. It would mean that an athletic association that is controlled by public schools could pre-

---

[5] Because the NCAA is composed primarily of *private* schools, *Tarkanian* did not address the question whether a national (or regional) athletic association would be engaged in state action if *public* colleges and universities from different States constituted a majority of its members. Nor is that issue presented in this case.

clude a private school from joining the association based on the race of its students, and the actions of the association would not be subject to challenge under the Constitution. It would also mean that such an athletic association could deny high school girls the opportunity to participate in a wide range of interscholastic sports without subjecting that practice to constitutional challenge.

In the past, athletic associations have been guilty of such discriminatory practices. See, *e.g.*, *Louisiana High Sch. Athletic Ass'n*, *supra* (denying admission to school composed of black students); *Brenden* v. *Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (precluding girls from participating in certain sports); *Hoover* v. *Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (same); *Carnes* v. *Tennessee Secondary Schs. Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976) (same); *Gilpin* v. *Kansas State High Sch. Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1974) (same). Allegations that high school athletic associations discriminate against female athletes persist today. *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729 (W.D. Mich. 2000).

A party may always sue a public school when it enforces an athletic association's discriminatory rule. See *Tarkanian*, 488 U.S. at 192-193. Not all rules imposed by an athletic association, however, are enforced by individual public schools. For example, when a private school is denied membership in an athletic association on the basis of the race or gender of its students, there is no enforcement of the rule by an individual public school. Thus, unless the athletic association itself may be sued, there would be no way to prevent the enforcement of such discrimination.

Even when an individual public school enforces a discriminatory rule, moreover, a suit against the school may not be as efficacious in remedying the discrimination as a suit against the athletic association itself. For example, a public school may be sued for enforcing a rule that unconstitutionally precludes a girl at its school from participating in a particular interscholastic sport. And, in such a case, the court may order the schools to give girls at the school the same opportunity to play on its interscholastic team as it gives to boys. But if the athletic association decides to enforce its discriminatory rule against the school and refuses to permit a team with girls on it to play, the court's remedy could leave the victims of discrimination without an effective remedy and deprive innocent third parties of interscholastic athletic opportunities as well. Those harsh consequences can be avoided if the acts of a publicly controlled athletic association may be challenged directly.[6]

---

[6] Regardless of whether it engages in state action, an athletic association that receives federal financial assistance would be prohibited from discriminating on the basis of race and sex by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459 (1999). We have argued that an athletic association is also covered by Title VI and Title IX when a school that receives federal assistance cedes controlling authority over its athletic program to the athletic association. *Id.* at 469. In *Smith*, the Court declined to resolve that issue. *Id.* at 470. The question whether an athletic association is covered by Title VI and Title IX when a recipient cedes to it controlling authority is distinct from the question presented here—whether the actions of an athletic association constitute state action when the association is controlled by representatives of public schools located in the same State.

D. Respondent's Regulation Of Interscholastic Athletic Competition Constitutes State Action

1. Under the principles discussed above, respondent's regulation of interscholastic athletic competition constitutes state action. Respondent is governed by a Legislative Council, which has authority to promulgate rules, and a Board of Control, which is responsible for enforcing the rules. Pet. App. 5B. Since approximately 84% of respondent's members are public schools, *id.* at 4B-5B, and each school is entitled to one vote in elections for respondent's Legislative Council and Board of Control, J.A. 89, 92, public schools have the power to control the elections for those governing bodies.

The membership of the Legislative Council and Board of Control is evidence of that power. At the time that sanctions were imposed against petitioner, the Legislative Council and Board of Control were composed exclusively of public school officials. Pet. App. 5B. In those circumstances, public schools and their officials effectively control respondent's regulation of interscholastic competition.

Respondent's regulation of interscholastic athletic competition also furthers government objectives. Tennessee has recognized, in a variety of ways, that interscholastic athletic competition is an integral part of public education. For example, as a component of its power to regulate the public school curriculum, the State Board has broad authority over interscholastic athletics. Tenn. Att'y Gen. Op. No. 83-163, 1983 WL 167080, at *2 (Apr. 5, 1983). The State Board allows interscholastic athletics to be substituted for the physical education graduation requirement, thus enabling

students to earn academic credit for participating in activities sponsored by respondent. Pet. App. 34B.

Between 1972 and 1996, the State Board formally delegated to respondent its authority to regulate interscholastic athletics for the State's public schools. Pet. App. 23B. The State treated respondent as its agent for that purpose, closely monitoring respondent's activities and repeatedly approving the association's regulations, including the recruiting rule challenged by petitioner. *Id.* at 11B, 24B-26B. In 1995, the State Board adopted a regulation "recogniz[ing] the value of participation in interscholastic athletics and the role of [respondent] in coordinating interscholastic athletic competition." *Id.* at 11B. That regulation also expressly authorizes public schools to join respondent, *ibid.*, which is the only interscholastic athletic association for public schools in Tennessee, *id* at 28B, 31B. Representatives of both the State Board of Education and the State Department of Education continue to serve as ex officio members of respondent's Board of Control and Legislative Council, *id.* at 35B, and the State allows respondent's employees to participate in the State's retirement system, *id.* at 33B.

Those circumstances show that public schools and their officials control respondent's actions and that those actions further the State's educational objectives. Respondent is therefore engaged in state action for purposes of the Fourteenth Amendment.

2. In reaching a contrary conclusion, the court of appeals relied primarily on this Court's decisions in *Blum* v. *Yaretsky*, 457 U.S. 991 (1982) (private nursing home not engaged in state action), *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982) (private school not engaged in state action, and *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522,

545 (1987) (United States Olympic Committee not engaged in state action). In those cases, however, the entities involved were controlled by private parties, and the question was whether certain forms of government action, such as extensive regulation, *Blum*, 457 U.S. at 1004, government funding, *Rendell-Baker*, 457 U.S. at 840-841, or the granting of a right to exclusive use of a word, *San Francisco Arts*, 483 U.S. at 544, transformed the private entities into state actors.

The situation here is entirely different. Here, respondent is composed primarily of public schools and those schools have effective control over respondent's governing bodies. Respondent's regulation of interscholastic competition therefore constitutes state action, and nothing in *Blum*, *Rendell-Baker*, or *San Fransciso Arts* suggests otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
DENNIS J. DIMSEY
GREGORY B. FRIEL
Attorneys

MAY 2000